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No. 03-439

In the Supreme Court of the United States

JONATHAN L. HAAS, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed petitioner's appeal of the district court's order denying his pro se motion seeking certain individualized relief in connection with this class action, which petitioner filed without securing the assistance of class counsel who represents him or seeking to intervene.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A) dismissing petitioner's appeal for lack of jurisdiction is unreported. The order of the district court (Pet. App. B) is unreported.

JURISDICTION

The order of the court of appeals dismissing petitioner's appeal for lack of jurisdiction was entered on June 16, 2003. Petitioner's motion for reconsideration of that order was denied on August 6, 2003 (Pet. App. E). The petition for a writ of certiorari was filed on September 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This petition arises out of a long-running, nationwide class action brought on behalf of Vietnam War veterans seeking disability and death benefits for exposure to Agent Orange during the Vietnam War. See *Nehmer* v. *Department of Veterans Affairs*, 284 F.3d 1158 (9th Cir. 2002); *Nehmer* v. *United States Veterans' Admin.*, 32 F. Supp. 2d 1175 (N.D. Cal. 1999); *Nehmer* v. *United States Veterans' Admin.*, 118 F.R.D. 113 (N.D. Cal. 1987). In 1987, the plaintiff class was certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure with no opt-out provision for unnamed members of the class. *Nehmer*, 118 F.R.D. at 115. Petitioner, a decorated veteran who served in the Vietnam War, is an unnamed member of the certified class. Pet. App. B.

In 1991, the class action was settled pursuant to a consent decree (Pet. App. C) that is subject to the ongoing jurisdiction of the district court for enforcement purposes. *Nehmer*, 284 F.3d at 1160. Generally speaking, under the consent decree, the United States Department of Veterans Affairs (VA) was required to promulgate new rules identifying diseases that have been shown to be associated with exposure to Agent Orange during the Vietnam War, applying a more lenient standard of proof of association than the one that the VA had initially applied in developing its rules. *Nehmer*, 32 F. Supp. 2d at 1176-1177. In addition, the VA is responsible for adjudicating the claims brought by individual class members (or their survivors) seeking benefits for allegedly service-connected diseases identified by the VA's Agent Orange regulations. *Id.* at 1177.

2. The VA's current regulations identify 11 diseases, including type 2 diabetes, which are presumed to have been incurred in or aggravated by service during the Vietnam War "[i]f [the] veteran was exposed to an herbicide agent during active military, naval, or air service." 38 C.F.R. 3.309(e); see also 68 Fed. Reg. 59,540 (2003). For purposes of this presumption of service connection, a veteran who "served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975," is presumed to have been exposed to such agents and, therefore, need not submit proof that he or she was exposed to herbicide agents in service. 38 U.S.C. 1116(f). The VA's regulations provide that, for purposes of the presumption of herbicide exposure, service in the Republic of Vietnam "includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. 3.307(a)(6)(iii).

In July 2001, petitioner filed a claim with the Phoenix, Arizona office of the VA, seeking disability compensation for type 2 diabetes and related conditions, which he alleges were caused by exposure to herbicide agents during his service on a Navy ship in the coastal waters of Vietnam. Pet. 2. The regional office denied that claim in May 2002. After petitioner submitted additional evidence, the regional office again denied the claim in December 2002. Petitioner appealed the denial of his benefits claim to the Board of Veterans' Appeals. See 38 U.S.C. 7101(a), 7104(a). That appeal is currently pending before the Board.

The VA regional office concluded that petitioner was not entitled to the presumption that he was exposed to herbicides during his service in the Republic of Vietnam. See 05/08/02 Rating Decision (VA File No. 24 699

165), attached to Motion to Show Cause at App. 35-39. The regional office noted that petitioner had served on a ship in the waters off the coast of Vietnam during the Vietnam War, but found that petitioner did not actually set foot on the shore of the Republic of Vietnam. *Id.* at 38-39. The regional office also found that there was no direct evidence that he was actually exposed to herbicides during his service. *Id.* at 39. Because herbicide exposure was not established, the regional office concluded that petitioner was not entitled to the presumption of service connection for diabetes. In his pending administrative appeal, petitioner challenges the requirement in 38 C.F.R. 3.307(a)(6)(iii) that physical presence in the Republic of Vietnam is necessary to trigger the presumption of exposure to herbicides.

3. On April 4, 2003, while his administrative claim was on appeal to the Board, petitioner filed in the district court a pro se motion to show cause why the VA should not be held in contempt for failing to grant him benefits.[1] In particular, the motion (at 14) sought an order holding the VA in "civil contempt"; "granting judgment to plaintiff sufficient to cover his health care needs and living expenses for the remainder of his life"; and fining the VA "an amount to ensure future compliance with the [consent decree]." The court denied the motion, explaining that, because petitioner "is a member of the certified class in this action and is represented by class counsel," "any motions in this case must be made through class counsel." Pet. App. B.

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[1] The motion stated (at 2 n.1) that "[petitioner] attempted to obtain representation by the attorneys that represented the plaintiffs in the original action," but that "[one attorney] was not willing to present new members of the plaintiff class and [petitioner] was unable to locate [another attorney]."

4. In an unpublished order, the Ninth Circuit dismissed petitioner's appeal for lack of jurisdiction. Pet. App. A. The court of appeals stated that "[a] review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable." *Ibid.* The court subsequently rejected petitioner's motion for reconsideration of that order. Pet. App. D.

ARGUMENT

The district court properly rejected petitioner's pro se motion to show cause where petitioner, an unnamed class member, did not secure the assistance of class counsel to bring the motion on his behalf or seek to intervene for the purpose of pursuing his individualized claim for relief on his own behalf. In addition, in those circumstances, the court of appeals properly dismissed petitioner's appeal for lack of jurisdiction. The unpublished order of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Petitioner states (Pet. 6) that, pursuant to 28 U.S.C. 1654, he "had a statutory right to appear personally in this matter." Section 1654 provides that, "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel." *Ibid.* But Section 1654 conditions that general authorization on "the rules of such courts" governing the "manage[ment] and conduct [of] causes therein." *Ibid.*

Rule 23 of the Federal Rules of Civil Procedure, which governs class actions, permits one or more named "representative parties" to maintain an action on behalf of a class of similarly situated individuals when certain criteria are met, including the requirement that the representatives will "fairly and ade-

quately protect the interests of the class." Fed. R. Civ. P. 23(a) and (b). Moreover, the settled practice under Rule 23—which is expressly embodied in subsection (g) of the amendment to Rule 23 scheduled to take effect on December 1, 2003—is for the court to appoint class counsel who will fairly and adequately represent the interests of all members of a certified class. Class counsel represents the interests, and acts on behalf of, the class members throughout the course of the proceeding, with one principal exception. The well-established practice—reflected in subsection (e)(4) of the proposed amendments to Rule 23—is that unnamed class members may appear and object to a proposed settlement at a fairness hearing concerning that settlement.

Section 1654 does not authorize petitioner, or unnamed class members writ large, to appear individually and file individual claims in a class action on their own behalf. Indeed, such a regime would largely negate the practical advantages of the class action device, especially in a case, such as this, in which there are tens of thousands of class members. But that does not mean that unnamed class members must rely solely on the representation of counsel appointed to represent their interests. In some class actions (though not this one), unnamed class members may elect to opt out of the class. Furthermore, even when, as here, class members do not enjoy such opt-out rights, the federal rules expressly authorize class members "to intervene and present [their own] claims or defenses." Fed. R. Civ. P. 23(d)(2).[2]

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[2] In addition, Rule 23(c)(2) states that, in class actions governed by Rule 23(b)(3), "any member who does not request exclusion may, if the member desires, enter an appearance *through counsel*."

Rule 24(a)(2) of the Federal Rules of Civil Procedure permits intervention of right when a class member shows that his interests are not being adequately represented by "existing parties." Fed. R. Civ. P. 24 advisory committee note (1966 Amendment). In addition, courts may grant unnamed class members permissive intervention pursuant to Rule 24(b). In practice, it is not uncommon for individual class members to seek to intervene in certified class actions to assert individualized claims for relief. See 5 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 16:9, at 175-176 (4th ed. 2002) ("Intervention may occur for the purpose of recovery. When it appears that damages issues may not be litigated cohesively, class members may intervene to argue their damages claims individually.") (footnotes omitted).

Petitioner's pro se motion to show cause sought individualized relief. In his motion (at 14), petitioner, *inter alia*, asked the district court not only to hold the VA in contempt for not granting petitioner's disability claim, but also to "grant[] judgment to [petitioner] sufficient to cover his health care needs and living expenses for the remainder of his life." The district court denied that motion on the ground that petitioner "is repre-

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Fed. R. Civ. P. 23(c)(2) (emphasis added). There is no comparable provision governing class actions, such as this one, certified under Rule 23(b)(2), but Rule 23(d) does authorize a court to "make appropriate orders" in any class action, and that provision has been interpreted to authorize a court, in its discretion, to permit an unnamed class member to enter an appearance through his own counsel. Fed. R. Civ. P. 23(d); see 5 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 16:13, at 192-193 (4th ed. 2002). Moreover, outside of the objection-to-settlement context discussed in the text above, there is no rule that authorizes individual class members to appear and act on their own behalf without counsel.

sented by class counsel," and "any motion in this case must be made through class counsel." Pet. App. B. That ruling is correct, and it is consistent with the settled understanding that, at least outside of the settlement context in which unnamed class members are permitted to appear and object to a proposed settlement, class members generally must act through the class counsel who has been appointed by the court to represent their interests in the litigation.

Prior experience in this litigation indicates that class counsel has acted to seek relief on behalf of individual class members who have had difficulty securing disability benefits through the administrative claims process. For example, in 1998, counsel for the plaintiff class appeared for the purpose of asking the district court to enforce the consent decree on the ground that the VA was "construing one aspect of the parties' settlement agreement too narrowly," and thus had "improperly den[ied] certain class members the full extent of retroactive benefits to which they are entitled." *Nehmer*, 32 F. Supp. 2d at 1176. That dispute arose when "counsel for plaintiffs learned of the situation of two class members, Rosa Aponte and Janet George," whose claims for certain benefits had been denied by the VA. *Id.* at 1178.

To the extent that petitioner asserts that class counsel was unreasonably unwilling to assist petitioner here, see note 1, *supra*, the proper course was for petitioner to seek leave to intervene in the action to present his individualized grievance. Because petitioner neither secured the assistance of class counsel nor intervened in the action to pursue the matter in his

own right, the district court properly denied his pro se motion for individualized relief.[3]

2. Petitioner challenges (Pet. 6-7) the court of appeals' dismissal of his appeal for lack of jurisdiction. However, for largely the same reasons that the district court properly refused to entertain petitioner's pro se motion for an order to show cause, the court of appeals properly dismissed petitioner's appeal of that order pursuant to 28 U.S.C. 1291. See Pet. App. A.

As this Court recently observed in *Devlin* v. *Scardelletti*, 536 U.S. 1, 9-10 (2002), although unnamed class members are parties to a class action in the sense that they are bound by the judgment in that action, they are not necessarily parties to the action in all senses. See *id.* at 10 ("The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context."). In *Devlin*, the Court held that unnamed members of a plaintiff class may appeal a district court order approving a class action settlement, without having to intervene in the action for purposes of bringing an appeal. In so holding, however, the Court emphasized that a "longstanding practice" in class actions is to allow unnamed class members to object to a settlement at a fairness hearing, and that "the power of appeal [recognized by the Court in *Devlin*] is limited to those nonnamed class members who have objected during the fairness hearing." *Id.* at 11. As this Court itself recognized, that requirement

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[3] Petitioner argues (Pet. 10) that his motion to show cause "was, in effect, a motion to intervene." That is incorrect. The motion did not request permission to intervene, or attempt to explain why intervention was warranted under Rule 24.

"limits the class of potential appellants [in class actions] considerably." *Ibid.*[4]

This case does not arise in the procedural context addressed by *Devlin*. Petitioner is not seeking to appeal an order approving a class action settlement to which he objected. Rather, as discussed, petitioner is seeking to appeal a post-judgment order denying his motion for an order to show cause why he is not entitled to certain individualized relief. Moreover, in seeking such relief, petitioner was not permitted by rule or generally accepted class action practice to act on his own behalf, as is true of unnamed class members who object to a class action settlement at a fairness hearing. Rather, petitioner sought a type of individualized relief for which he either should have secured the assistance of class counsel or formally intervened in the action. Having failed to do either, petitioner is not a proper party to the litigation for purposes of maintaining an appeal, and the court of appeals therefore properly dismissed his appeal.

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[4] In *Devlin*, this Court emphasized that, in the class-action-settlement context, the interests of the class representative who has *agreed* to a settlement may diverge from the interests of unnamed class members who have *objected* to that settlement. See 536 U.S. at 9 ("Petitioner's right to appeal this aspect of the District Court's decision [*i.e.*, the court's decision rejecting petitioner's objections to a settlement] cannot be effectively accomplished through the named class representative—once the named parties reach a settlement that is approved over petitioner's objections, petitioner's interests by definition diverge from those of the class representative."). That is not true here. In this case, petitioner's own interests in securing disability benefits from the VA for his alleged exposure to Agent Orange do not necessarily diverge from the interests of the class representatives. And, as discussed, in this litigation class counsel has sought relief when the benefit claims of certain unnamed class members were denied by the VA.

Powers v. *Eichen*, 229 F.3d 1249 (9th Cir. 2000), relied upon by petitioner (Pet. 6), is not to the contrary. In that case, the court held "that an unnamed class member who files an objection in district court to the amount of attorneys' fees requested in a class action settlement under Rule 23 may appeal the award of such fees without intervening in the district court." 229 F.3d at 1256. In other words, *Eichen* involved a variation of the same basic issue resolved by this Court in *Devlin*—*i.e.*, "whether to allow non-intervening unnamed parties to appeal the fairness of a settlement award in a Rule 23 class action." *Id.* at 1255. The court did not consider whether an unnamed class member was entitled to appeal without attempting to intervene outside of the objection-to-proposed-settlement context, much less in the unique post-judgment circumstances here.

The other lower court decisions cited by petitioner (Pet. 8-9) are similarly inapposite and do not in any way conflict with the court of appeals' unpublished order dismissing petitioner's appeal in this case. None of those cases supports the proposition, much less holds, that an unnamed member of a certified class represented by class counsel is entitled to pursue an individualized claim for relief without either securing the services of class counsel or seeking to intervene in the action, or to appeal a district court order rejecting an attempt to do so.[5]

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[5] See *Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546, 1549 (11th Cir.) (holding that the district court had improperly decertified an employment discrimination class action), cert. denied, 479 U.S. 883 (1986); *Penson* v. *Terminal Transp. Co.*, 634 F.2d 989, 995 (5th Cir. 1981) (holding that a class member's post-judgment individual suit was not barred by the entry of judgment in the class action, where the notice given to class members of their opt-out rights was found to be inadequate); *Herrera-Venegas* v. *Sanchez-*

3. Petitioner errs (Pet. 7-8) in suggesting that the court of appeals had jurisdiction pursuant to 28 U.S.C. 1292(a)(3). That provision authorizes appeals of "[i]nterlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." *Ibid.* This is not an "admiralty case," and, in denying petitioner's motion to show cause, the district court did not exercise any admiralty jurisdiction.

Nor did the court of appeals have jurisdiction under 28 U.S.C. 1292(a)(1), which, *inter alia*, authorizes appeals from orders "refusing to dissolve or modify injunctions." In *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981) (citation omitted), this Court held

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Rivera, 681 F.2d 41, 42 (1st Cir. 1982) (holding that a nonlawyer prisoner could not appear as "Paralegal Counsel" in the appeal of a non-class action); *Jordan* v. *Jones*, 563 F.2d 148, 148 (5th Cir. 1977) (holding that allegations in a subsequent individual action that the class action defendants were not complying with an order in the class action required the district court either to reopen the class action and refer the new complaint to the class action counsel or to consolidate the new case with the class action); *United States* v. *Grismore*, 546 F.2d 844, 847 (10th Cir. 1976) (holding that a criminal defendant did not have a right to be represented by lay counsel of his choice); *Albertson's, Inc.* v. *Amalgamated Sugar Co.*, 503 F.2d 459, 463-464 (10th Cir. 1974) (holding that the district court properly declined to certify a class action where the named plaintiffs were competitors). Citing *United States* v. *Taylor*, 569 F.2d 448 (7th Cir.), cert. denied, 435 U.S. 952 (1978), petitioner argues (Pet. 9) that the "right of self-representation is a Constitutional right." But *Taylor*, a criminal case, merely discussed the familiar principle recognized in *Faretta* v. *California*, 422 U.S. 806, 836 (1975), that the criminally accused enjoy a "constitutional right to conduct [their] own defense." See *Taylor*, 569 F.2d at 452 (citing *Faretta*). That principle does not apply in the civil context in which this case arises.

that an interlocutory order refusing to enter a consent decree containing injunctive relief is appealable under 28 U.S.C. 1292(a)(1) as an order refusing an injunction, if the order might have a "serious, perhaps irreparable, consequence," and if the order can be "effectually challenged" only by an immediate appeal. In this case, however, petitioner did not challenge a refusal to enter or modify a consent decree. The consent decree in this case was entered a number of years ago. Rather than challenging or seeking to modify that decree, petitioner moved for an order to show cause why respondent should not be held in contempt for failing to make certain disability payments and grant him a judgment sufficient to cover certain costs.

4. The fact that petitioner has yet to exhaust his administrative remedies provides an additional basis to deny the petition for certiorari. As explained above, petitioner has challenged the VA's denial of his claim for benefits and his appeal is currently pending before the Board of Veterans' Appeals. If petitioner prevails on appeal, he may secure the disability benefits that he seeks. If he does not prevail, he may then obtain judicial review of the VA's final administrative decision in the manner prescribed by Congress. See 38 U.S.C. 7252, 7292 (authorizing appeal of decisions of the Board of Veterans' Appeals to United States Court of Appeals for Veterans Claims, and appeal of decisions of the latter court to the Court of Appeals for the Federal Circuit). The *Nehmer* class action, which involves legal issues of general application that were common to the members of the class, should not ordinarily displace the orderly procedures prescribed by Congress for the resolution of claims of individual veterans seeking relief. Moreover, given that petitioner's administrative claim is still pending on appeal, his motion for an order

to show cause why the VA should not be held in contempt for not granting such benefits was at the very least premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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